

Wis-Pak Foods, Inc. and United Food and Commercial Workers, Local 73A, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 30-CA-12755 and 30-RC-5638

December 12, 1995

**DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION**

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issues presented in this case are whether the judge correctly found that the Respondent committed several violations of Section 8(a)(1) of the Act and engaged in objectionable conduct requiring the invalidation of a representation election.¹ The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wis-Pak Foods, Inc., Butler, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ On August 3, 1995, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) when Chief Operating Officer Segel promised production employees a wage increase, we rely only on employee Willie James Chison's credited testimony about Segel's statements to employees.

The Respondent has excepted to the judge's conclusion that the Respondent's change of its overtime policy was objectionable, contending that the change was announced outside of the critical period. Although the announcement of the change was made 2 days before the petition was filed, we agree with the judge that the actual change in the Respondent's overtime policy, which was not made effective until after the petition was filed, was objectionable.

Finally, we correct three chronological misstatements in the judge's decision. First, Segel testified that he gave an anti-Teamsters' speech "sometime" in August, rather than mid-July or early August. Second, Segel testified that he learned about the Union's campaign on October 17, 1994, not on December 15, 1994. Third, Manufacturing Manager Korbar essentially testified that there had been no changes in attendance rules since August 1994, not August 1992. None of these misstatements materially affected the judge's analysis of the issues presented.

³ There are no exceptions to the judge's recommendation to dismiss certain allegations of 8(a)(1) violations.

[Direction of Second Election omitted from publication.]

Dennis M. Selby, Esq., for the General Counsel.

Gary A. Marzak, Esq., and *Thomas W. Mackinzie, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

Ike Edwards, of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. An order consolidating cases and notice of hearing on objections was issued on April 14, 1995, in Cases 30-CA-12755 and 30-RC-5638. The original charge in Case 30-CA-12755 was filed on December 19, 1994, by the United Food and Commercial Workers, Local 73A, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union) and was served on Wis-Pak Foods, Inc. (the Respondent) on the same date. The first amended charge filed by the Union on March 10, 1995, was served on the Respondent on the same date.

A complaint and notice of hearing issued on April 14, 1995. In the complaint it was alleged that the Respondent granted unlawful wage increases and committed other violations of Section 8(a)(1) of the National Labor Relations Act.

Case 30-RC-5638 concerned objections to a election that occurred on December 15, 1994.

The Respondent filed timely answers denying that it had committed the unfair labor practices alleged.

The matter was heard on May 16, 17, and 18, 1995, in Milwaukee, Wisconsin. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of facts and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

**FINDINGS OF FACT, CONCLUSIONS, AND REASONS
THEREFOR**

I. BUSINESS OF RESPONDENT

At all material times, the Respondent, a corporation with an office and place of business in Butler, Wisconsin (Respondent's facility), has been engaged in the operation of a meat processing facility that produces hamburger patties for customers in the fast food industry.

During the past calendar year ending December 31, 1994, Respondent, in conducting its operations described above purchased and received products, goods, and materials at its facility valued in excess of \$50,000 directly from points outside the State of Wisconsin and sold and shipped products valued in excess of \$50,000 directly from its Butler facility to customers located outside the State of Wisconsin.

At all material times, the Respondent has engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Respondent is a patty-making plant that is engaged in the forming of hamburger products. Its principle customer is Burger King. At the time the events herein were taking place the Respondent was operating what has been termed the north plant. It was in the process of opening a south plant, which went on line in February 1995, although it was scheduled to go in to operation on December 5, 1995. The Respondent used FORMAX machines to form the hamburgers. The Respondent operated 10 assembly lines in the north plant and 3 in the south plant.

Prior to October 2, 1994, the Teamsters were trying to organize the Respondent's employees. In mid-July or early August Justin Segel, chief operating officer of the Respondent, gave an anti-Teamsters speech to employees.

On October 2, 1994, the Teamsters held a meeting for the Respondent employees. There were 65 to 75 employees present. Representatives of United Food and Commercial Workers of America, Local 73A also attended the meeting. It was explained to the employees present that the Teamsters were surrendering jurisdiction over the production and maintenance employees and that thereafter Local 73A would take over the organizational drive. Local 73A authorization cards were distributed. Some cards were signed by employees at the meeting. Other cards were distributed by the employees at the Respondent's plant and in the cafeteria. Thereafter Local 73A pursued the organizational effort. By October 12, 1994, Local 73A had gathered 79 authorization cards. Around 226 employees were in the unit. Employees "gripes" were inadequate wages, maintenance employees had been given raises but not the production workers, the attendance program was unfair, and overtime was denied some employees during a holiday week. Local 73A, by Ike Edwards, passed the first leaflets at the plant on October 10, 1994. The leaflet announced a meeting of October 12, 1994. The leaflet was passed out prior to the first and second shifts. While Edwards was passing out leaflets someone came from the plant and advised Edwards that he was on company property. Afterwards a police officer appeared and told Edwards that he would have to obtain a permit to distribute leaflets. Edwards obtained the permit. Thereafter Edwards passed out leaflets at the street entrance.

The Teamsters ceased organizing after October 2, 1994.

Justin Segel, the chief operating officer of the Respondent, testified that he was aware of the Teamsters campaign in July and that he learned of Local 73A's campaign when its petition for an election was filed on December 15, 1994. Segel testified that he had become aware of the Teamsters organization effort "through anecdotal information." By mid-September Segel testified,

We were getting very little feedback about it. We saw almost no evidence, especially in September, of any activity or letters or anything like that. And then there was what was billed as—some sort of final meeting, I think the last week in September or some time around

then. And feedback we got was that less than 10 people attended and the Teamsters said that they were backing away from it.¹

I am convinced that the Respondent knew about the union organizational campaign from its genesis. Although Segel appeared to be an intelligent and able individual I am further convinced that his testimony was tailored to fit the defense that the Respondent has proffered in this case.

A. The Maintenance Department Raise

Michael Allen Nelson was the Respondent's plant engineer. He has been employed for 1 year. His first duties were "to get the maintenance department on track." The "problem" was that the Respondent did not have enough maintenance people. At that time there were 12 maintenance employees, now there are 17.

On October 9, 1994, "an across the board" wage increase was granted to the maintenance employees who received "from slightly less than 50 cents an hour upward to \$3.00 an hour." Their last wage increase had been the previous January.

When Nelson came aboard he tried to find out why the Respondent was losing employees in the maintenance department. To accomplish this he talked to the current employees and some supervisors. Nelson discovered that there were three issues: "One being pay," a "second was the management and differences with management," and "the third item was the number of hours that they were being asked to work." The employees in maintenance were working 7 days a week in the range of 55 to 65 hours. Nelson made a wage comparison between the Respondent's wages and area wages. He "felt we were somewhere around the 50 percent mark."

The Respondent was operating three maintenance shifts. On the first shift were assigned an electrician and three mechanics, on the second were an electrician and two mechanics, and on the third were five mechanics. The Respondent needed 16 employees for a full compliment. According to Nelson the Respondent did not have the required complement "because people had left and they had not been able to find people to take their place." Moreover, expansion was to occur when the Respondent opened its south plant on December 5, 1994. The expansion would require six additional employees. Thus, the Respondent faced increasing its maintenance crew to 22.

In order to alleviate the situation Nelson proposed what was termed TPC. TPC was a training program, the purpose of which was to upgrade the existing staff and any new staff "in regards to about twelve different disciplines involving maintenance." "We asked them to take twelve placement tests, on regarding each of the areas, and based upon those results they would be rolled over from the old maintenance program to the new maintenance program." There were 130 training manuals. Wage raises were factored into the program.

¹ It seems incongruous that the feedback would have revealed the details of the Teamsters' last meeting without a mention of Local 73A and the distribution and signing of authorization cards especially when Segel testified, "[N]othing is very secret very long in the work place."

The program failed. The “existing maintenance rebelled against the program.” People were “continuing to leave because they could not get the benefits of the new wage proposal.” Nelson testified, “I was continuing to bring people to the interview and I could not get them hired on at the wages that I was able to offer.” Although the TPC program went in effect July 3, 1994, no one received a wage increase. To get a wage increase the employees had to go through the TPC program. According to Nelson what they had to do was “[t]ake each one of the twelve tests and then depending on the number that they passed would put them onto the new wage scale as far as a range.” None of the employee who took the tests passed except one who took the refrigeration tests. Some employees threatened to leave.

In the meantime the Respondent sought employees through advertising in magazines and newspapers. It advertised at technical schools. The TPC wage scale was offered and Nelson received 120 job applications. For prospective employees, whom Nelson thought had potential, interviews were set up. Nelson interviewed 80 applicants through July, August, and September. A number of the applicants mentioned that the wages offered were below what they were currently earning and they were not interested in the job. The Respondent was able to hire four applicants. Because the Respondent was unable to hire employees it worked its current employees longer hours and engaged outside contractors to perform some of the maintenance work. The Respondent also experienced substantial downtime. The TPC program was tabled because maintenance employees would not cooperate. Nelson also realized that the pay scale for the area was low and that the “type of individuals [he] was looking for [he] could not get into the plant at the wage [the Respondent] was offering.” The number of maintenance employees had not increased. It stood at or 11 or 12. The Respondent was still “10 mechanics or technicians short.” As stated by Nelson, “We felt we needed to increase our wages and we need to shelve the TPC program and get our existing crew onto the new pay scale.” On October 9, 1994, a wage increase was put into effect for the maintenance employees. It was in line with the Milwaukee market, based on an independent survey. Some of the employees whom Nelson had interviewed who had refused employment now accepted the new pay scale and went to work. Other employees in the plant were upset by the wage increase for the maintenance employees. Realizing this, he explained the situation in a captive audience speech.

In order to maintain our current, as well as new equipment and facilities, we have qualified maintenance employees. Since the first of the year, downtime has increased over 100%. (Chart) this problem is also Responsible in part for our Saturday work; something you and I both do not want. Further, this directly impacts your gain sharing. Currently we have 12 maintenance employees, down from 14, and we need 22. We put big ads in the paper, interviewed approximately 78 applicants, and none of them took the job (waive the applications). The reason given was that due to their skills, they would get more elsewhere. We made a business decision, to raise the wage rate to attract new maintenance personnel. Because we had no choice. [G.C. Exh. 6, p. 10.]

The Respondent maintains that the Respondent’s decision to increase maintenance wages was motivated by business reasons and not union activity. I agree.

The Board said in *United Airline Services Corp.*, 290 NLRB 954 (1988):

It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees’ vote in the election and were of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As a general rule, an employer’s legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not in the scene. *R. Dakin*, supra, quoting *Reds Express*, 268 NLRB 1154, 1155 (1984). In determining whether a grant of benefits is objectionable, the Board had drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See, e.g., *Singer Co.*, 199 NLRB 1195 (1972).

From the above-detailed facts it is apparent that the Respondent was faced and had been faced with a deteriorating situation. Its seriousness was magnified by the fact it was opening a new addition that needed additional maintenance employees that it was unable to obtain because of its low wage scale. Indeed, the situation had reached emergency proportions requiring the Respondent to utilize outside contractors. Thus, the Respondent’s determination to grant maintenance employees a wage raise was based on business consideration and would have occurred even though the Union had not been in the picture. Moreover, if the wage increase was given to influence employees favorably it failed, because the remaining employees (around 200) were antagonized because they received no increases.

The allegations in the complaint that claim the October 6, 1994 increase given to maintenance employees was unlawful are dismissed.

B. Change in Overtime Pay, October 12, 1994

The Respondent’s overtime policy provided that if individuals worked over 40 hours in 1 week they would be compensated at time and a half, however, if a holiday fell in the week, the holiday would not be considered as time worked in computing the overtime. Employees complained about not receiving overtime during the weeks in which holidays fell. On October 12, 1994, a notice was posted changing the policy so that employees would be paid overtime for those weeks in which a holiday fell. The notice reads: “For the purpose of computing overtime, all paid scheduled days off (for example: holidays, personal days, funeral leave days) will be counted as days worked.” The new overtime policy was effective October 17, 1994.

Segel testified that after the Teamsters’ campaign “went away” the overtime policy change that had been considered

before was put into effect. In one of his captive audience speeches Segel, referring to changes that the Respondent had made, said, "We also changed the overtime policy so some one who is on a personal or vacation day during the week, and works on Saturday still receives the overtime pay."

Segel commented, "[T]his was accomplished without a union. Who needs a union." The fact that Segel used the change in overtime as an example of the Respondent's beneficence in order to persuade employees to vote against the Union is explicative of his purpose in making the change.

Segel testified that during his anti-Teamsters speech, during a question and answer period, the question was raised concerning why employees were not paid time and a half for Saturday work in a week in which a holiday fell. Segel at once resolved to remedy the situation. He asked his counsel if he could change the rule. According to Segel his counsel's answer was negative. Thereafter when he thought that the Teamsters' campaign was over with, "and we weren't aware that there was another campaign brewing," he changed the rule. I consider the statement, "we weren't aware that there was another campaign brewing" to be an untruth. As stated above, I am convinced that Segel tailored his testimony to accommodate the Respondent's defense in this case. His testimony about the change in overtime pay is another example.² I find that the change in overtime pay was for the purpose of discouraging union affection in derogation of employees' Section 7 rights, and to appease the employees and convince them they did not need a union. "Who needs a union."

The Respondent's change in overtime pay violated Section 8(a)(1) of the Act. Cf. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

C. Lydia Stanley Caldwell's Alleged 8(a)(1) Violations

The Respondent maintained a program that provided a \$100 bonus to employees who recruited persons who remained employed for at least 60 days. Montel Joyner, an employee, was aware of the program. According to Joyner as he was driving down the street when he saw a lady whom he knew; she stopped him. During the conversation that ensued she said that she needed a job. He thought about the \$100 and told her they were "needing people" at the Respondent's plant. She asked Joyner to take her to the plant. The lady's name was Linda but Joyner did not know her last name nor where she lived. Joyner drove Linda to the plant where he told Caldwell that Linda was looking for a job. Caldwell gave her an application and took her into another room. Joyner left and returned to his car. When Linda did not return Joyner returned to the plant because he was scheduled to work at 2 p.m. Caldwell called him "in there" and said, "Montel, you know if you vote for the Union . . . the

union is bad for you. The union is no good." She continued, "If you vote for the union you might not even have a job . . . you could lose your 401K, insurance, even your job."

"Then she said something to Linda about was she voting union." She asked, "[H]ow do you feel about the union."

Caldwell denied that either Joyner had brought a person in for employment or that she had made the remarks attributed to her by Joyner.

I have carefully considered the demeanor of the two witnesses and the probabilities regarding whether the conversations actually occurred and I am unable to reach resolution. As the General Counsel has the burden of proving by a preponderance of evidence that of the alleged violations occurred, I shall dismiss that part of the complaint that attributes unlawful conduct to Caldwell.

In view of my ruling it becomes unnecessary to determine whether Caldwell was an agent of the Respondent.

D. Unser Warning

Christine F. Cumming testified that about a week before November 17, she said to employee Paul Klosterman that she "heard we had enough cards signed that they could have a union vote." A short time later, Frank Unser, a second shift supervisor, called Cumming to the personnel office. She went to the office where she found Unser and supervisor trainee Rich Kirby. Cumming describes what occurred:

So I went down there and Rich Kirby who was in training for the second shift supervisor position and Frank Unser were both standing there and Frank said he wanted to talk to me and I said, "Oh, what did I do?" And he took me into the human resource office and asked me what I had said to Paul—or he said, "What did you have to say in the ticket office?" And I said I only—I just said all I heard was that we had enough votes for the union to come in and take a vote on a union. "Well, you shouldn't talk about union. Look what is going on with Briggs and Stratton. Look at all the other companies that were in a union, how many are closed down and on strike. This place had a union and it didn't work for them so let's not talk about the union. Talk about going against the union."

And I replied, "I don't give a shit because I've worked in union and nonunion places so I could really care less," and Rich Kirby looked at Frank Unser and he says, "It's true. I have known Chris and she has worked in both union and nonunion places." So when I left he said, "Well, remember, talk nonunion. It's not good for this company."

Cumming also testified on cross-examination, "[H]e specified that I should talk against the union and talk for not union in the company plant," and "He said look at other companies, look at Briggs & Stratton."³

Cumming further testified on cross-examination, "You should not be talking about the union on the shop floor, that it wasn't right for me to talk about the union because a lot of people's jobs were on the line. . . . Well, Rich Kirby and

²In drawing my credibility resolutions I am not unmindful of the Supreme Court's observation in *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

For the demeanor of a witness:

. . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies. *Dyer v. MacDougall*, 201 F.2d 265, 269.

³On cross-examination Cumming testified in regard to Briggs & Stratton, "They planned on shipping jobs down south," and that a "hot" debate was going on between the union and the company.

I are friends and will say joking around between us he said, 'Now don't you do it again or you'll be in big trouble.'" Cumming viewed it as a joke "because I've known him for many, many years." She said she did not feel intimidated.

Kirby denied the conversation, Unser did not testify. I credit Cumming.

The Respondent's claims Unser's remarks were privileged opinion. His remarks, however, had a tendency to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights by his implication of job loss, restrictions on union activities, and encouragement of engaging in nonunion activities.

In the case of *Helena Laboratories Corp.*, 228 NLRB 294, 295 (1977), the Board said, "[I]t is axiomatic by now that a finding of restraint or coercion depends not on the subjective impressions of employees, but on the objective standard as to whether such conduct reasonably 'tends to interfere with the free exercise of employee rights.'"

By Unser's remarks the Respondent violated Section 8(a)(1) of the Act.

E. Alleged Change in Attendance Policy

Montel Joyner testified that he sought to ask Segel a question about the point system at one of the captive audience meetings.⁴ Segel said he could not answer any questions at that time. Later Linda Korbar, manufacturing manager, called Joyner into the office to answer his question about the point system. She said, according to Joyner, that "it had been changed" and that he should "go out and spread the word." She said, "We couldn't post it but it's been changed." Korbar said that "if you had say an emergency and you called in, you wouldn't lose a point for that [o]r going to court or something like that you could prove." Joyner spread the word to other employees. According to Joyner if an employee received eight points he would be fired. Employees had complained about this system.

Korbar testified that the no-fault program had been last revised in August 1994. The last revision before the August revision was in 1992. The August revision changed the word "discharge" to "subject to discharge."

Among other things the Respondent's attendance rules provided:

ATTENDANCE POLICIES

A. Attendance will be considered acceptable until an employee's record of chargeable absences becomes excessive. Employees who develop a record of excessive chargeable absences shall be subject to disciplinary action.

B. Employee absences shall be classified into two categories:

1. Non Chargeables

The Company realizes that certain absences are not only excusable should not be charged to the employee's attendance record and are not to be part of the disciplinary procedure.

a. *Vacation*—An authorized absence scheduled and approved and limited to the amount of continuous vacation days permitted the employees according to the Company vacation policy.

b. *Holiday*—Absence to observe established holidays according to the Company holiday policy.

c. *Jury Duty*—Absence resulting from jury duty or subpoenaed witness service as authorized according to jury duty policy.

d. *Military*—Absence to fulfill military obligations as defined by the Company military policy.

e. *Industrial Injury*—Absence as deemed necessary by the attending physician to recover from injury sustained as a result of on-the-job accident.

f. *Funeral*—Absence resulting from the death of a member of the immediate family shall include: spouse, child, mother, father, mother-in-law, father-in-law, brother or sister.

g. *Authorized Leave of Absence*—Absence for which the employee is placed on approved family, medical, personal or military leave of absence according to Company policies or applicable law regarding such leave of absence.

h. *Scheduled Time Off*—Absences resulting from such designated time off as determined by management.

i. *Weather Conditions*—Absences which occur during those times when management feels attendance is not mandatory due to hazardous weather conditions.

2. Chargeables

The following categories of absence are defined as chargeable and are subject to disciplinary action if they become excessive:

a. *Late*—Failure to report to work area at the start of the scheduled shift.

b. *Leaving*—Failure to complete a full shift for reasons other than on-the-job injury.

c. *Unexcused*—No call/no show absences which are unreported and unexplained.

d. *Unauthorized Leave of Absence*—Absence for any reason including illness or injury, which does not qualify for leave for absence as outlined in Section B.1.g. above.

These rules do not specifically cover emergencies or court appearances.

Korbar testified that there had been no change in the rules since 1992 at which time they were promulgated.

Korbar determines whether a leave of absence is to be approved. Korbar explained, "We go under the basis of the law, what is required by that. We take in account the nature of the situation, what type of request is being made." Korbar gave an example of an emergency leave that was allowed when an employee requested leave because "his fiancée's son had been shot in the head, been critically injured, and he needed to leave."⁵

Korbar testified that during the election campaign employees asked questions about the attendance policy. A typical

⁴ Segel's first captive audience speech was delivered on November 8, 1994.

⁵ Another example was given about employees who carpooled and were delayed in a traffic jam caused by a fatal accident. They were not excused; they were given points.

question was: "The attendance policy is unfair because of my child gets hit by a car and in the hospital, I am going to get charged attendance points for. . . that was a common thread throughout the conversation that we had" Korbar explained to the employees that if the employees provided documentation that the child was hit by a car, they would not be charged attendance points.

Korbar could not "specifically recall" Joyner coming into her office when the attendance program was discussed, but she did hear that employees at some of the captive meetings had asked questions about the attendance policy.

As noted, according to Korbar, during the election campaign, she responded to employees' assertions that the attendance policy was unfair because it did not allow for emergencies such as when a child was hit by a car. Apparently she tried to ease employees' apprehensions by telling them that if the employees provided documentation they would not be charged attendance points. Thus, it does not seem unlikely that when Joyner asked a question about the attendance Korbar would have tendered him an answer somewhat similar to the answers she had given other employees.

Apparently what Korbar wanted to convey to Joyner was that there was a modification in the administration of the attendance policy that would accommodate employee's emergencies. Such departure from what appeared to be past practice was clearly the granting of a benefit and was for the purpose of appeasing the employees who believed the plan did not accommodate emergencies.

That the change was not in the wording of the policy is immaterial. The change was in the administration of the policy. Korbar gave employees a reason to believe that the attendance policy would be administered in a more lenient and humane manner in the future. Such representations had a tendency to condition employees' union affection.

I credit Joyner regarding this incident.

By Korbar's remarks to Joyner the Respondent violated Section 8(a)(1) of the Act. Cf. *B & D Plastics*, 302 NLRB 245 (1991).

F. Alleged Promised Wage Increase

During the election campaign, commencing on November 8, 1994, Segel gave a number of speeches to captive audiences of 18 to 25 employees. At one of these speeches Willie James Chison asked about the raises the maintenance employees received. Chison testified, "I asked him about raises maintenance got and I explained to him about sibling rivalness, that if one person in the family got a bicycle or a piece of cake that the rest of them should get a bicycle or piece of cake too. Otherwise you had problem with the rest of the employees. And he said he would take care of the other part of you—that we would get a raise. I asked about that amount but I didn't get an amount on that and I didn't get a date on when maintenance got a raise but he told us that the rest of the plant would get a raise after first of the year."

On cross-examination Chison testified that he asked Segel "[W]hy was it that maintenance got a raise and we didn't." Segel responded that "he was trying to keep his maintenance department intact."

On cross-examination employee Cumming, who had attended some of the meeting, was asked whether Segel had said that he could not talk about wage raises because of

union activity. She answered, "Yes." Cumming also quoted Segel as saying he had to give the maintenance raises to "keep Wis-Pak running."

Segel remembered that Chison asked if the employees were going to get a raise. According to Segel he responded, "[W]e would review wages, as we have in the past, in January," which was his usual response to this question when asked by employees.

Because a promise of a wage raise during an election campaign is an unfair labor practice⁶ the Respondent's guilt depends on which witness, Segel or Chison, I deem to be truthful. As noted above I have considered Segel to have tailored his testimony to accommodate the Respondent's defenses. I see no reason to treat this testimony differently. Concerning Chison, he appeared to have lacked the sophistication necessary to have made up the story. I have also considered demeanor and Segel's supererogatory characteristics. Moreover, because the Respondent had sometimes in the past given wage increases in January (see *infra*) Segel's admitted statement that he told employees that "we would review wages, as we have, in the past" was tantamount to saying "we will grant a wage raise in January as we have done the past," which he did. Segel was affirming the expectations of the employees.

By Segel's statements to employees in respect to a wage increase, the Respondent violated Section 8(a)(1) of the Act.

G. The January Wage Increase

On January 22, 1995, the Respondent gave its production workers a wage increase. Segel testified that the Respondent "typically reviewed every January" the situation in regard to wage increases. "Sometimes we didn't give wage increases." "January is usually when at least we review when we are."

An across-the-board increase was given in 1988; the next one was given in 1992. Increases in 1989, 1990, and 1991 were not given because of the Respondent's strained financial condition. In 1993 the Respondent did not grant a wage increase because it installed a gain-sharing plan. The gain-sharing plan payoff was greater than the wage increase would have been. In 1994 a wage increase was granted. The wage increase was 3 percent. All across-the-board increases were granted in the month of January.

The turnover among production maintenance quality control employee in 1993 was 45.7 percent; in 1994 it was 76 to 78 percent.

In 1995 Segel made the final decision to grant an across-the-board increase after considerations of his staff. The increase was 5.4 percent.

On November 3, 1994, G.C. Long sent a memorandum to K. Glinski and others in part as follows:

As a follow up to Brett's memo of October 1, 1994, I would like to set up a meeting to begin reviewing our wage structure. Our last wage review was January, 1994 and would be due this January, 1995.

⁶In *Low Kit Mining Co.*, 309 NLRB 501, 507 (1992), it was said, "Offering financial inducements to employees during an organizational campaign is a classic violation of the Act."

Prior to setting the meeting date, I think it would be helpful to disseminate some basic wage data for everyone's review.

A meeting was suggested for no later than the week of November 14. Glinski's⁷ staff conducted a wage survey. Glinski proposed a 4-percent wage increase.

A meeting was held in early January 1995. Present were George Lang, Frank Vigniere, Brett Chambers, Linda Korber, Kathy Kirst, and Glinski. A 5.4-percent wage increase was recommended. It was given to the employees on January 22, 1995.

According to Segel, in respect to the 4-percent recommendation, "Frank Vigniere looked at it, thought about it, thought about the turn-over problem, and thought that, being a marketing kind of guy, you know, 7.99 sounds cheaper than 8, well, in this case \$8.00 seemed a quantum amount better than \$7.87 or \$7.89 or whatever it was. . . . We wanted to ring the bell at \$8.00." Thus, the 5.4 percent resulted from selecting a base rate of \$8. The base rate in 1994 had been \$7.89. According to Glinski, "Frank Vigniere suggested strongly that we go to \$8.00 starting salary," to keep other employers from drawing off the Respondent's employees. "[A] lot of employees were being lost to a company called Tombstone."

As noted above, the election occurred on December 15, 1994. Objections to the election were filed on December 22, 1994. Thus, the objections were pending when the Respondent gave the January wage increase.

The unfair labor practices found herein, as well as the speeches of Segel demonstrate the Respondent's antiunion animus and its fixed purpose to defeat the Union's organization campaign, ". . . every equivocal act that was done may be properly viewed in the light of the Respondent's animus toward the effort to organize its men." *NLRB v. Houston & North Texas Motor Freight Lines*, 193 F.2d 394, 398 (5th Cir. 1950) cert. denied 543 U.S. 934 (1951).

As noted above I have found that Segel promised employees a raise after the first of the year. The January raise was in recognition of this promise. In a somewhat similar situation the Board has said in *Reliable Ambulance Services*, 256 NLRB 1165 (1981):

The profit-sharing plan subsequently announced and implemented by the Employer as the fulfillment of its earlier objectionable promise is similarly objectionable. An employer is not free to carry out an objectionable promise made during the critical period of a first election, and then argue that he is merely implementing a promise made at an earlier time. Rather, it is clear that the implementation of a promise initially made to defeat a union is simply another step in that effort, and is therefore objectionable when undertaken during the critical period of a subsequent election. Such a grant is designed to assure continued employee support of an employer's position in a subsequent election. *Triangle Plastics, Inc.*, 166 NLRB 768, 775 (1967). We therefore find that Employer's announcement and implementation of the profit-sharing plan, made at a time when objections to the first election were still pending and

the possibility of a second election was very real, was an objectionable continuation of its earlier objectionable promise. We accordingly set aside the second election. [Footnote omitted.]

See also *Pembrook Management*, 296 NLRB 1226, 1242 (1989). Cf. *Hobby Farms Corp.*, 311 NLRB 273, 274 (1993).

This language from the case of *Triangle Plastics*, 166 NLRB 768, 775 (1967), cited by the Board in *Hospital Service Corp.*, 219 NLRB 1, 19 (1975), is apropos:

On the basis of the entire record, I am convinced that the postelection announcement of the general wage increase which was made at a time when the election "was clearly subject to invalidation if the objections were meritorious," was "an attempt to gain [employee] support and to assure a continued majority against the union representation in the event a second election was directed by the Board. I also find that the amount of the increase was intended as a further inducement to employees to vote against the Union should the Board direct a second election. Accordingly, I find that the Respondent's announcement of the wage increase interfered with the Board's election procedures and made a fair election impossible and therefore constituted in addition violation of Section 8(a)(1) of the Act.

The Respondent struck with the "fist inside the velvet Glove."⁸ I conclude that the timing and motive of the Respondent in granting an increase while objections to the election were pending was to dissuade and discourage employees from voting for the Union in a second election if one were ordered. In reaching this conclusion I am not unmindful of the principles that the Board has applied to wage increase cases. See *United Airlines Corp.*, 290 NLRB 954 (1988).

The credible record does not reveal that there was an emergency that faced the Respondent necessitating a grant of a wage increase during the pending of election objections. It was not chiseled in stone that a wage increase was a January certainty. Indeed, wage increases were not given in 1989, 1990, 1991, and 1993. Thus, from some employees' standpoint it does not necessarily appear that the Respondent had a fixed policy to grant wage increases in January although Segel lead some employees to believe that a wage increase was in the offering when he promised them and said, "[W]e would review wages, as we have in the past." In regard to turnover the Respondent employer produced no credible evidence that employee turnover had effected production or profits. Apparently the Respondent was able to obtain sufficient temporaries for on occasion temporaries who were called were not needed. The Respondent's defenses of past practice and employee turnover were pretexts to cloak its real purpose. Its real purpose was to cause a defeat of the Union in a second election if it occurred and to demonstrate to employees that they did not need a union to obtain a wage increase. ("Who needs a union.")

The Respondent's grant of wage increases on January 22, 1995, was in violation of Section 8(a)(1) of the Act.

⁷ Kenneth Glinski is the director of human resources.

⁸ See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

H. The Objections to the Election

As noted above an election was held on December 15, 1994. The petition was filed on October 14, 1994, and a direction of election issued on November 14, 1994. There were 77 votes cast for the Union and 113 ballots cast against the Union. On December 22, 1994, the petitioner filed the following objections to the election.

On October 12, 1994, the Employer issued a notice changing the overtime pay policy for all employees, effective October 17, 1994.

Shortly before the election the Employer changed its established attendance policy to no longer charge employees a point if they have family emergencies and have to leave the facility.

An employee was told by Frank Unser not to be talking about the Union on the plant floor, that it was not right to talk about the Union because a lot of peoples' jobs were on the line.

Employees were promised a wage increase in January.

On April 14, 1995, the objections were consolidated with this case for the purpose of hearing, ruling, and decision by an administrative law judge.

As noted in the foregoing decision I have found all the objections to be well taken.

Having found that the Respondent engaged in violations of Section 8(a)(1) of the Act during the critical election campaign period.⁹ I find that the Respondent has unlawfully interfered with the employees' exercise of a free choice for or against a bargaining representative. "Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." *Dal Tex Optical Co.*, 137 NLRB 1782, 1786 (1962); *Concord Furniture Industries*, 241 NLRB 643 (1979); *GTE Automatic Electric*, 196 NLRB 902 (1972).

I further find that, by reason of unlawful interference the election conducted on December 15, 1994, should be set aside and held for naught. "If an election were won by the employer through illegal conduct and in violation of law, the Union was wronged and it had a right to have such an election set aside." *NLRB v. Plaskolite, Inc.*, 309 F.2d 788, 790 (6th Cir. 1962).¹⁰

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

⁹ See *Ideal Electric Co.*, 134 NLRB 1275 (1961).

¹⁰ The Respondent maintains that the Respondent's acts of interference were too isolated to justify the direction of a new election. It has been said in *Pembroke Management*, 296 NLRB 1226, 1242 (1989):

In determining whether an employer's unfair labor practice conduct is *de minimus* with respect to affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors *Caron International*, 246 NLRB 1120 (1979).

Applying these principles I find the Respondent's position is not well taken.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Respondent unlawfully interfered with the representation election held on December 15, 1994, and a new election should be conducted.

THE REMEDY

It is recommended that the Respondent cease and desist from its unfair labor practices take certain affirmative action deemed necessary to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Wis-Pak Foods, Inc., Butler, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully changing the overtime pay policy for employees to discourage their union activities.

(b) Unlawfully warning employees not to talk about the Union in order to discourage their union affection.

(c) Unlawfully changing its attendance policy to discourage union activities.

(d) Unlawfully promising or granting wage increases to discourage union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its plant in Butler, Wisconsin, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this decision.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the election held on December 15, 1994, be set aside and a new election be ordered in conformity with the Board's practices and procedures.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully change the overtime pay policy for employees to discourage their union activities.

WE WILL NOT unlawfully warn employees not to talk about the Union in order to discourage their union affection.

WE WILL NOT unlawfully change our attendance policy to discourage union activity.

WE WILL NOT promise or grant wage increases to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WIS-PAK FOODS, INC.